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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1947

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No. 764

MICHAEL DOWNS, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE

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**On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit**

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINION BELOW

The opinion of the Tax Court (R. 51-68) is reported at 7 T. C. 1053. The opinion of the Circuit Court of Appeals (R. 96-108) is reported at 166 F. 2d 504.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 27, 1948. (R. 109.) The

petition for a writ of certiorari was filed on April 26, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Whether the taxpayer was a bona fide resident of a foreign country or countries during 1943, within the meaning of the applicable tax statutes and regulations, so that his salary for 1943 is exempt from income tax.

## STATUTE AND REGULATIONS INVOLVED

The applicable statute and regulations are set out in the Appendix, *infra,* pp. 13-17.

## STATEMENT

The facts as stipulated (R. 14-17) and found by the Tax Court (R. 54-60) may be summarized as follows:

Early in 1942 Lockheed Aircraft Corporation entered into a contract with the United States Government in which the corporation agreed to organize, equip and operate an aircraft depot in Northern Ireland in connection with the war effort. In connection with the operation it was necessary for Lockheed Aircraft Corporation and its wholly owned subsidiary, Lockheed Overseas Corporation (hereafter referred to as "Lockheed"), to employ large numbers of skilled men in the United States and transport them to the British Isles. (R.

54.) From January 1 to June 30, 1942, taxpayer was employed as an aircraft mechanic in the United States by Lockheed Aircraft corporation at Burbank, California. (R. 55.)

On April 23, 1942, taxpayer made out and signed a formal application for overseas employment with Lockheed and in connection with such application signed a contract shortly thereafter with the corporation in which he agreed to perform services for the company at an aircraft depot to be operated by it in the British Isles. In his application for foreign service taxpayer indicated a willingness to serve as an employee of Lockheed overseas for more than two years, if necessary. (R. 55.) The contract (R. 19-33) which taxpayer signed provided *inter alia* that his employment would commence when he reported for duty at a point within the United States to be designated by Lockheed, at the time and place so designated, and should continue until November 1, 1942, or such later date as might be agreed upon and thereafter until sixty days after return transportation to the United States was made available by Lockheed, it being understood that such return transportation would be available on November 1, 1942, or the later date agreed upon or as soon thereafter as practicable under the circumstances then existing; that during the time that taxpayer remained at the place or places of his duty outside of the United States, Lockheed would furnish or cause to be furnished,

without cost to him, such adequate food, lodging, special clothing and equipment, medical, nursing, and hospital services and treatment and recreational facilities as circumstances would reasonably permit; that taxpayer would submit prior to departure and from time to time during his employment to such vaccination, inoculation, and/or any other medical, dental, surgical, nursing, and/or hospital treatment, preventative or curative, as Lockheed or other medical staff at the destination or elsewhere might from time to time specify, without expense to taxpayer; that Lockheed might direct the return to the United States of taxpayer, if in its judgment taxpayer's health condition was unfavorable; and that on certain conditions Lockheed would either pay or reimburse taxpayer for all taxes lawfully levied or assessed by any foreign government against him with respect to his residence, occupation, salary, or income. (R. 55-57.)

Pursuant to the terms of his contract, taxpayer left the United States for the British Isles on June 30, 1942, and landed several weeks later in Glasgow, Scotland. (R. 57.)

Taxpayer was admitted to the British Isles on a visa as an employee of Lockheed. This visa, under British Law, had to be put in use within three months from the date is was issued but the time that the holder would be allowed to stay was not mentioned therein. The visa, under British law, permitted taxpayer to remain for the purpose for

which it was given, as an employee of Lockheed, and if and when Lockheed terminated its work over there, taxpayer was expected to depart within a reasonable time when transportation was available and subject to any extension that might be given him by the home office in London or local authorities in Belfast. (R. 58.)

After disembarking, taxpayer was first assigned to an R. A. F. base near Liverpool, England, in the capacity of a field and service mechanic. Later he was transferred to Ireland for a short time after which he was moved from time to time to different air bases in England and Ireland where he performed essential services for the British Air Force, the American Air Force and the Polish Air Force, always as an employee of Lockheed. (R. 58.)

The expiration date of taxpayer's contract was extended by agreement of the parties until May 1, 1943, at which time he entered into a new contract with Lockheed. (R. 58.) The new contract provided, *inter alia,* that the term of his employment should continue for the duration of the contract between the Government and Lockheed as extended and for such period after completion of the contract as Lockheed deemed necessary to wind up operations under the contract after termination or completion, and thereafter until return transportation to the United States for taxpayer was made available by Lockheed, which it was to obtain as promptly as practicable. (R. 58-59.)

The taxpayer remained in the employ of Lockheed stationed in the British Isles and Northern Ireland until July 12, 1944, when he returned to the United States and to the address where he now resides in Los Angeles, California. During the period of taxpayer's absence from the United States, his wife Eleanor[1] remained in the United States with taxpayer's three minor children and lived at the family residence in Los Angeles. (R. 59.)

Taxpayer received as compensation for personal services rendered to Lockheed in the British Isles and Northern Ireland during the year 1943 the sum of $5,438.50 of which 90 percent was deposited by the corporation to the account of the taxpayer with the California Bank in Los Angeles pursuant to Article 2 of his employment contract. (R. 59-60.)

Taxpayer did not at any time make application to become a citizen of Northern Ireland or a British subject. During the taxable year 1943 he was domiciled in the United States and intended to return to this country as soon as the war in Europe was

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[1] The Tax Court's findings of fact and opinion also cover the appeal of Eleanor J. Downs from a determination of the Commissioner asserting a deficiency due from her for 1943 computed on her income represented by one-half of the taxpayer's salary. Her case was appealed to the Circuit Court of Appeals for the Ninth Circuit, where a stipulation was made that her case is to await the final decision in taxpayer's case.

over. He did not pay any income taxes to the Government of Northern Ireland or the United Kingdom of Great Britain for the year 1943. (R. 60.)

On these facts the Tax Court, one judge dissenting without opinion, held that the taxpayer was not a bona fide resident of a foreign country in 1943 within the meaning of Section 116 of the Internal Revenue Code, as amended, and the controlling Treasury Regulations, and that consequently his salary earned during 1943 was not exempt from income tax. (R. 60-68.) The Circuit Court of Appeals affirmed.[2] (R. 96-108.)

**ARGUMENT**

1. The opinion of the Circuit Court of Appeals in this case is not in conflict with *Swenson* v. *Thomas,* 164 F. 2d 783 (C. C. A. 5th), as the taxpayer alleges (Pet. 13-17). The Circuit Court of Appeals pointed out (R. 107), that the facts in this case differentiate it from the *Swenson* case, and as will be shown, *infra,* the facts fully support the factual conclusion of both lower courts that the taxpayer was not a bona fide resident of a foreign country during 1943. Whether or not the correct factual inference as to Swenson's bona fide residence in Colombia was drawn by the Fifth Circuit Court of Appeals in the *Swenson* case, the same

[2] The lower court's opinion also covered the case of J. Gerber Hoofnel, who has also filed a petition for certiorari, now pending before this Court, No. 765, this Term.

finding is not compelled by the different facts in the present case.[3]

Nor does a conflict appear between the opinion in this case and that in *Swenson* v. *Thomas, supra,* in the construction and application of the controlling statute and regulation. Both decisions recognize that Section 148 of the Revenue Act of 1942, which amended Section 116 (a) of the Internal Revenue Code (Appendix, *infra*) to exempt from income tax the earned income from sources without the United States[4] of a citizen who "establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country"

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[3] In contrast to the facts in the case at bar, Swenson had been in the foreign service of his corporation for some years prior to 1941, at which time he made a three year contract for foreign service, which was subsequently extended for another year. He does not appear to have been engaged in work directly related to the Government's war activities, nor was he controlled in the same way as military personnel. He made his own living arrangements, for the expense of which he was reimbursed by his employer, and was not obliged to accept such living, medical, and recreational facilities as his employer provided. During his stay in Colombia, he paid income taxes to the Colombian Government. Upon facts quite similar to those in the *Swenson* case, the Tax Court recently held that an employee of the same corporation as employed Swenson and assigned to the same work group as Swenson was a bona fide resident of Colombia during 1943. See *Harvey* v. *Commissioner*, 10 T. C. 183. Although we do not concede the correctness of the *Swenson* decision, it does present a different set of facts which precludes the existence of a conflict.

[4] Section 119 (c) (3) of the Internal Revenue Code (26 U. S. C. 1940 ed., Sec. 119) defines "compensation for labor or personal services performed without the United States" as an item of gross income to be treated as "income from sources without the United States."

during the entire taxable year, changed the test to one of actual residence in a foreign country for the whole year, not mere physical absence from the United States for more than six months as was required for exemption from tax under the previous law;[5] and both decisions recognize that the question of bona fide residence is to be determined under Sections 29.211-2 to 29.211-5 of Treasury Regulations 111, establishing rules for determining whether aliens are bona fide residents of this country.

Contrary to taxpayer's contention, the Circuit Court of Appeals did not err in stating (R. 106)

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[5] The prior law commencing with Section 213(b)(14) of the Revenue Act of 1926, c. 27, 44 Stat. 9, exempted from tax the earned income from sources outside the United States of a citizen of the United States who was a "bona fide non-resident" of the United States for more than six months of the taxable year. The purpose of the exemption was to increase foreign trade by benefiting those employed abroad in selling merchandise of the United States (H. Rep. No. 1, 69th Cong., 1st Sess., p. 7 (1939-1 Cum. Bull. (Part 2) 315, 320); cf. S. Rep. No. 52, 69th Cong., 1st Sess., pp. 20-21 (1939-1 Cum. Bull. (Part 2) 332, 348); H. Conference Rep. No. 356, 69th Cong., 1st Sess., p. 33 (1939-1 Cum. Bull. (Part 2) 361, 364)). A citizen was considered a bona fide non-resident of the United States within the meaning of the law if he was physically absent from the United States for more than six months of the taxable year. See 67 Cong. Record, Part 4, p. 3781; *Commissioner* v. *Fiske's Estate*, 128 F. 2d 487 (C. C. A. 7th, certiorari denied, 317 U. S. 635; *Commissioner* v. *Swent*, 155 F. 2d 513 (C. C. A. 4th), certiorari denied, 329 U. S. 801; S. M. 5446, V-1 Cum. Bull. 49 (1926); G. C. M. 9848, X-2 Cum. Bull. 178 (1931); G. C. M. 22065, 1940-1 Cum. Bull. 100; cf. *Carstairs* v. *United States*, (E. D. Pa.), decided January 15, 1936 (17 A. F. T. R. 1044).

that under Section 29.211-2 of Treasury Regulations 111 (Appendix, *infra*) bona fide residence in a foreign country includes the element of a temporary home in, or an identification in some degree with the customs of, that country. (Pet. 11, 15.) The regulation incorporates this concept in the provision that one whose purpose may necessitate an extended stay and who to that end "makes his home" temporarily in the foreign country may acquire a residence. See also I. T. 3642, 1944 Cum. Bull. 262. Furthermore, this concept of residence is fully in harmony with the legislative intention as to its meaning in the amended law. Statement of Senator George, Hearings before Committee on Finance, United States Senate, on H. R. 7378, 77th Cong., 2d Sess., Vol. 1, p. 743; S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 54-55, 116 (1942-2 Cum. Bull. 504, 548-549, 591). Although the Fifth Circuit Court of Appeals in *Swenson* v. *Thomas, supra,* p. 785, indicated that the term "making one's home temporarily" in a country means no more than living there temporarily, the court did not hold that mere physical presence in the country would suffice; its ruling presents no square conflict with that of the Circuit Court of Appeals in this case, since Swenson identified himself with the living customs of the foreign country to some degree (see fn. 3, *supra*), whereas the taxpayer in this case was not shown to have done that at all.

2. On the facts in this case the Circuit Court of Appeals correctly affirmed the Tax Court's find-

ing that the taxpayer was not an actual bona fide resident of a foreign country during 1943 within the meaning of the regulation. The taxpayer had not previously been in foreign service for his company and he went abroad in 1942 with the intention of staying at most only so long as was necessary to carry out his contract. His employer had contracted to provide return transportation to the United States upon completion of his work and his British visa required him to leave when his work terminated. His was thus not a "mere floating intention" to return to the United States at some undetermined time, but on the contrary his intention to return was definitely fixed as to time. Although the taxpayer actually stayed abroad for about two years, he did not make "his home" temporarily in the British Isles. Instead, he used the living and recreational facilities furnished at air bases by his employer, which were similar to those afforded military personnel, retaining his family home in Los Angeles, where his wife and children resided. He made no application to become a British subject (cf. Section 29.211-4 of Treasury Regulations 111 (Appendix, *infra*) and paid no taxes to the United Kingdom. The purely transient character of his stay is emphasized by the fact that 90% of his compensation was deposited to his credit in a Los Angeles bank. These facts support, if they do not compel, the conclusion that the taxpayer was a technician temporarily away from his home, rather than a bona fide resident of a for-

eign country.[6] Cf. *Ingram* v. *Bowers*, 47 F. 2d 925 (D. C. S. D. N. Y.), affirmed on other grounds, 57 F. 2d 65 (C. C. A. 2d); *Carstairs* v. *United States*, *supra*.

Moreover, since the statute grants an exemption from taxation, it should be construed strictly against the taxpayer (*United States* v. *Stewart*, 311 U. S. 60, 71; *Pacific Co.* v. *Johnson*, 285 U. S. 480, 491). This principle confirms the correctness of the judgment in this case.

## CONCLUSION

Since the judgment of the Circuit Court of Appeals is correct on the facts and is not in conflict with other decisions, the petition for a writ of certiorari should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
*Solicitor General.*

THERON LAMAR CAUDLE,
*Assistant Attorney General.*

SEWALL KEY,
LEE A. JACKSON,
HELEN GOODNER,
*Special Assistants to the Attorney General.*

May, 1948.

[6] In the case of employees on projects related to the war, who were sent abroad in similar circumstances, the Tax Court has consistently found that they are not bona fide residents of a foreign country. *Johnson* v. *Commissioner*, 7 T. C. 1040; *Love* v. *Commissioner*, 8 T. C. 400; *Chapin* v. *Commissioner*, 9 T. C. 142; cf. *Bouldin* v. *Commissioner*, 8 T. C. 959.

## APPENDIX

Internal Revenue Code:

SEC. 116. EXCLUSIONS FROM GROSS INCOME.

In addition to the items specified in section 22 (b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) [as amended by Section 148 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] EARNED INCOME FROM SOURCES WITHOUT THE UNITED STATES.—

(1) FOREIGN RESIDENT FOR ENTIRE TAXABLE YEAR.—In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25 (a) if received from sources within the United States; but such individuals shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

* * * * * * * *

(26 U. S. C. 1940 ed., Supp. V, Sec. 116)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

> SEC. 29.116-1.[7] EARNED INCOME FROM SOURCES WITHOUT THE UNITED STATES.—For taxable years beginning after December 31, 1942, there is excluded from gross income earned income in the case of an individual citizen of the United States provided the follow-lowing conditions are met by the taxpayer claiming such exclusion from his gross income: (*a*) It is established to the satisfaction of the Commissioner that the taxpayer has been a bona fide resident of a foreign country or countries throughout the entire taxable year; (*b*) such income is from sources without the United States; (*c*) the income constitutes earned income as defined in section 25 (a) if received from sources within the United States; and (*d*) such income does not represent amounts paid by the United States or any agency or instrumentality thereof. Hence, a citizen of the United States taking up residence without the United States in the course of the taxable year is not entitled to such exemption for such taxable year. However, once bona fide residence in a foreign country or countries has been established, temporary absence therefrom in the United States on vacation or business trips will not necessarily deprive such individual of his status as a bona fide resident of a foreign country. Whether

[7] This regulation was amended by T. D. 5373, 1944 Cum. Bull. 143, 147, in respects not applicable here.

the individual citizen of the United States is a bona fide resident of a foreign country shall be determined in general by the application of the principles of sections 29.211-2, 29.211-3, 29.211-4, and 29.211-5 relating to what constitutes residence or nonresidence, as the case may be, in the United States in the case of an alien individual.

* * * * * * * *

SEC. 29.211-2. DEFINITION.—A "nonresident alien individual" means an individual—

(*a*) Whose residence is not within the United States; and

(*b*) Who is not a citizen of the United States.

The term includes a nonresident alien fiduciary.

An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that

end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.

* * * * * * * *

SEC. 29.211-4. PROOF OF RESIDENCE OF ALIEN.—The following rules of evidence shall govern in determining whether or not an alien within the United States has acquired residence therein within the meaning of chapter 1. An alien, by reason by his alienage, is presumed to be a nonresident alien. Such presumption may be overcome—

(1) In the case of an alien who presents himself for determination of tax liability prior to departure for his native country, by (*a*) proof that the alien, at least six months prior to the date he so presents himself, has filed a declaration of his intention to become a citizen of the United States under the naturalization laws, (*b*) proof that the alien, at least six months prior to the date he so presents himself, has filed Form 1078 or its equivalent, or (*c*) proof of acts and statements of the alien showing a definite intention to acquire residence in the United States or showing that his stay in the

United States has been of such an extended nature as to constitute him a resident;

(2) In other cases by (*a*) proof that the alien has filed a declaration of his intention to become a citizen of the United States under the naturalization laws, (*b*) proof that the alien has filed Form 1078 or its equivalent, or (*c*) proof of acts and statements of an alien showing a definite intention to acquire residence in the United States or showing that his stay in the United States has been of such an extended nature as to constitute him a resident.

In any case in which an alien seeks to overcome the presumption of nonresidence under (1) (*c*) or (2) (*c*), if the internal-revenue officer who examines the alien is in doubt as to the facts, such officer may, to assist him in determining the facts, require an affidavit or affidavits setting forth the facts relied upon, executed by some credible person or persons, other than the alien and members of his family, who have known the alien at least six months prior to the date of execution of the affidavit or affidavits.

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